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WHEN THE LAW OF THE FORUM WILL BE SUBSTITUTED FOR THE PROPER LAW GOVERNING THE CAPACITY OF MARRIED WOMEN TO CONTRACT.—In general, the capacity or incapacity of persons is determined by the law of the domicile of the person.[1] Capacity is usually a passive element in any transaction imposed by law, and hence the proper law governing it is the law of the legal situs of the person, the *lex domicilii.* But in the case of voluntary contracts, entered into in a state other than the domicile, capacity becomes an active element in the transaction. For, it is well settled that a person who leaves his state of domicile and voluntarily enters into a contract in another state is not entitled, in general, to the protection of the laws of his domicile in respect to his capacity to enter into the contract. By leaving his domicile and voluntarily contracting in another state with persons who rely on the laws of that state, he subjects himself to the laws thereof, and comity demands that the sovereignty of that state over all acts done there should be respected in other states.[2] And since the capacity to enter into a contract relates to the making of it, the rule is well established that the capacity of a person to make a contract is governed by the law of the place where the contract is made.[3] In

[1] Lamar *v.* Micou, 112 U. S. 452; Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321.

[2] Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241; Armstrong *v.* Best, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473; Bell *v.* Packard, 69 Me. 105, 31 Am. Rep. 251.

[3] Campbell *v.* Crampton (C. C.), 2 Fed. 417; Garrigue *v.* Keller, 164 Ind. 676, 74 N. E. 523, 108 Am. St. Rep. 324, 69 L. R. A. 870; Thomp-

other words, the proper law governing the capacity of persons to make voluntary contracts is the *lex celebrationis* of the contract.

However, when the forum is the domicile of the party, the law of the forum may be substituted for the proper law, if the public policy of the forum or the interests and general welfare of its citizens demand that the *lex fori* be enforced. But opposed to this policy of protecting the interests and welfare of the citizens of the forum, is the fundamental policy that each state has of upholding the rules of private international law, recognizing that a contract, valid under the proper law, should be upheld as valid everywhere. When these two policies conflict, the courts of the forum must decide which of the two policies is of greater importance in that particular case.

When the incapacity imposed by the law of the domicile is general or total, it seems that if the action is brought in the state of domicile, the court is fully justified in substituting the *lex fori* for the proper law in order to protect its citizens.[4] The imposing of such total or general incapacity shows that the domicile state considers it more important to protect the persons incapacitated than to uphold the general policy of enforcing the rules of private international law.

This principle is well brought out in the leading case of *Armstrong* v. *Best*.[5] A married woman, domiciled in North Carolina, entered into a contract in Maryland. By the law of Maryland, the contract was valid, but under the law of North Carolina, which placed a total disability upon the capacity of married women to contract, the contract was void. The suit on the contract was brought in North Carolina. The court held that the law of North Carolina (the domicile and forum) would be substituted for the law of Maryland (the *lex celebrationis* and therefore the proper law). Since married women in North Carolina were under the total disabilities of married women at common law, it was undoubtedly the settled local policy of North Carolina to throw around a married woman all the protection possible to prevent her from contracting liabilities against herself or her property. The holding of the court, that the enforcement of the contract would directly contravene the policy of North Carolina to protect married women who were domiciled there, seems absolutely sound.

But the situation is very different when the incapacity imposed by the law of the domicile is only partial. It does not seem that the policy of a state to protect married women is of such great

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son *v.* Taylor, 66 N. J. L. 253, 49 Atl. 544, 88 Am. St. Rep. 485, 54 L. R. A. 585; Wood *v.* Wheeler, 111 N. C. 231, 16 S. E. 418; Robinson *v.* Queen, 87 Tenn. 445, 11 S. W. 38, 3 L. R. A. 214; International Harvester Co. *v.* McAdam, 142 Wis. 114, 124 N. W. 1042, 20 Ann. Cas. 614, 27 L. R. A. (N. S.) 774.

[4] Armstrong *v.* Best, *supra;* Appeal of Freeman, 68 Conn. 533, 37 Atl. 420; Hanover Nat. Bank *v.* Howell, 118 N. C. 271, 23 S. E. 1005. See MINOR, CONFLICT OF LAWS, § 72.

[5] *Supra.*

importance, when the disabilities imposed on them are only partial. If married women are permitted to contract in general, but are prohibited from making certain kinds of contracts only, it seems that the policy of protection to them should not be considered of such great importance as to override the policy of upholding the principles of comity among states that are so well recognized.[6]

The leading case of *Milliken* v. *Pratt*[7] illustrates this principle well. A married woman, domiciled in Massachusetts, made a contract in Maine, as guarantor for her husband. Under the laws of Maine the contract was valid, but the laws of Massachusetts prohibited married women from entering into contracts of this kind, and declared them void, but married women were not under the total disabilities of the common law. Suit was brought against the married woman on the contract in Massachusetts (her domicile). The court held that the proper law to govern was the law of Maine (the *lex celebrationis*), and that the *lex fori* would not be substituted for the proper law. Therefore, the Massachusetts court considered the general policy of upholding contracts valid where made to be of greater importance than the local policy declaring these particular contracts void.

If the policy of the *lex fori* and domicile is not so pronounced as to declare the contract void, but only makes it voidable, the *lex celebrationis* will be enforced even in the courts of the domicile.[8]

The courts have absolute power to substitute the law of the forum for the proper law, since the state has complete control and power over all persons and things within its borders, and the laws of another state are recognized only because policy and justice demand it. But if proper weight is given to the principles of comity, the proper law will be enforced unless it is clearly opposed to the settled policy of the forum state. A contract is not necessarily contrary to the public policy of a state merely because it would be void if made in that state. In the case of *International Harvester Co.* v. *McAdam*,[9] in reference to how strong must be the local policy to override the proper law, the court said: "There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the court, something pernicious and injurious to the public welfare." Were it not for such a principle, there would be no occasion for private international law, for a contract would then be enforceable only in the state where made, or in those states whose laws would approve it.

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[6] Milliken *v.* Pratt, *supra;* Bell *v.* Packard, *supra;* Garrigue *v.* Keller, *supra;* Thompson *v.* Taylor, *supra.* See MINOR, CONFLICT OF LAWS, § 72.

[7] *Supra.* The authority of this case is not weakened, as has often been maintained, by the fact that a Massachusetts statute enlarging the rights of married women was passed just before the case was decided. The court based the decision on the principles of private international law, and the statute was not taken into consideration.

[8] MINOR, CONFLICT OF LAWS, p. 148.

[9] *Supra.*

Whether or not a particular contract is contrary to the policy of the forum depends primarily upon the legislative action on the matter. If the legislature has indicated by express enactment that the policy of the state is to render void all contracts of a particular kind made by its citizens within the state or without, then the courts must enforce that policy if the question is brought before them.[10] But if the legislature permits married women to contract generally, but prohibits only certain contracts made by married women, the local policy of protecting married women should not be considered so strong as to overcome the principles of comity.[11] And, in fact, it is fast becoming recognized that there is no great need of protecting married women in their contracts, and, therefore, the importance of a local policy incapacitating them should not be considered vital to the welfare of the citizens of the forum.

In the recent case of *Meier & Frank Co.* v. *Bruce* (Idaho), 168 Pac. 5, a married woman domiciled in Oregon entered into a contract there which was valid under the laws of Oregon. She later became domiciled in Idaho, where the contract was void. The Idaho law imposed many disabilities on the capacity of a married woman to contract, but permitted her to make contracts for her own use and in reference to the management of her separate estate. Suit was brought in Idaho to enforce the contract. The court held that the law of Oregon (the *lex celebrationis*) was the proper law to govern, and that the *lex fori* would not be substituted for it, since, in the opinion of the court, no public policy of that state would be violated. The opinion in this case follows the principles above asserted.

However, in a recent case in the Supreme Court of the United States the court seems to have arrived at a conclusion that is entirely out of accord with the well-settled principles governing these questions. In the case of *Union Trust Co.* v. *Grosman*, 38 Sup. Ct. 147, a married woman domiciled in Texas entered into a contract as guarantor for her husband in Illinois. Under the laws of Illinois the contract was valid, but the law of Texas declared such contracts void. Suit was brought in the federal district court of Texas to enforce the contract, and on a *certiorari* to the Supreme Court it was held that the law of Texas should govern. The court recognized the general principle that the *lex celebrationis* governs the question of the capacity to enter into voluntary contracts, but held that the *lex fori* should be substituted for the proper law, because the enforcement of the contract would contravene the public policy of Texas. However, the court failed to show in what particular the enforcement of the contract would violate the public policy of Texas. The mere fact that the contract, if made in Texas would have been void, does not of itself show that such contracts

[10] Armstrong *v.* Best, *supra.* See Young *v.* Hart, 101 Va. 480, 44 S. E. 703; Case *v.* Dodge, 18 R. I. 661, 29 Atl. 785.

[11] Thompson *v.* Taylor, *supra;* International Harvester Co. *v.* McAdam, *supra;* First Nat. Bank *v.* Hinton, 123 La. 1018, 49 South. 692.

were opposed to the settled policy of that state. Clearly, if the disability imposed by the Texas law on the capacity of married women to contract was total or general, it would violate the public policy of Texas to enforce the contract, and, therefore, the court should substitute the *lex fori* to protect its citizens. However, it does not appear from the opinion whether the incapacity was total, or whether only partial.[12] The reasoning is that since these particular contracts of a married woman as guarantor are void in Texas, it follows that to enforce a contract of this nature would contravene the public policy of Texas. It is submitted with the greatest deference that if such a rule is applied to contracts of this sort made in other states, the result will be that such contracts will in most cases be enforceable only in the state where made. And if the same principle be applied to contracts generally, so that the courts of the forum will refuse to enforce any contract valid by its proper law simply because the *lex fori* declares it void, on the ground that the contract would violate the policy of the forum, it would go far to destroy the whole science of private international law applicable to foreign contracts, as it has been painfully built up through the centuries. By such a rule the other great policy which every state recognizes of upholding contracts valid where made is utterly disregarded.

RIGHT OF READOPTED CHILD TO INHERIT FROM THE FORMER ADOPTIVE PARENTS.—Though adoption was recognized by the civil law and the laws of many of the ancient nations, it was entirely unknown to the common law of England. And in the United States adoption exists only by virtue of statutes giving the right to create that status.[1] In the older systems of laws where adoption has been practiced for a long time the rights of adopted children have been well settled, and the adopted child is considered just as much the child of its foster parents as if born to them in wedlock.[2] But in the United States the courts have found difficulty in harmonizing this doctrine with the idea that is deep-seated in us, that the child born to its parents is no less their child even though the legislature provides that it may become the child of another by adoption. Since adoption statutes are in derogation of the common law and are opposed to the theory on which our laws of

[12] In the report of the case in the Circuit Court of Appeals, Grosman *v.* Union Trust Co. (C. C. A.), 228 Fed. 610, Ann. Cas. 1917B, 613, it is seen, as a matter of fact, that the Texas laws imposed only a partial disability upon the capacity of married women to contract.

[1] Hence if the adoption statute is void, no rights can be created by an adoption. Albring *v.* Ward, 137 Mich. 352, 100 N. W. 609. On the other hand, if a child is validly adopted in compliance with the laws of one state, the status of adoption will be recognized in any other state. Ross *v.* Ross, 129 Mass. 243, 37 Am. Rep. 321; Van Matre *v.* Sankey, 148 Ill. 536.

[2] Vidal *v.* Commagere, 13 La. Ann. 516.